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In the Supreme Court of the United States

OCTOBER TERM 1967

No. 530

FRANCOSTEEL CORPORATION, a corporation,
Petitioner,

vs.

N.V. NEDERLANDSCH AMERIKAANSCHE, etc. a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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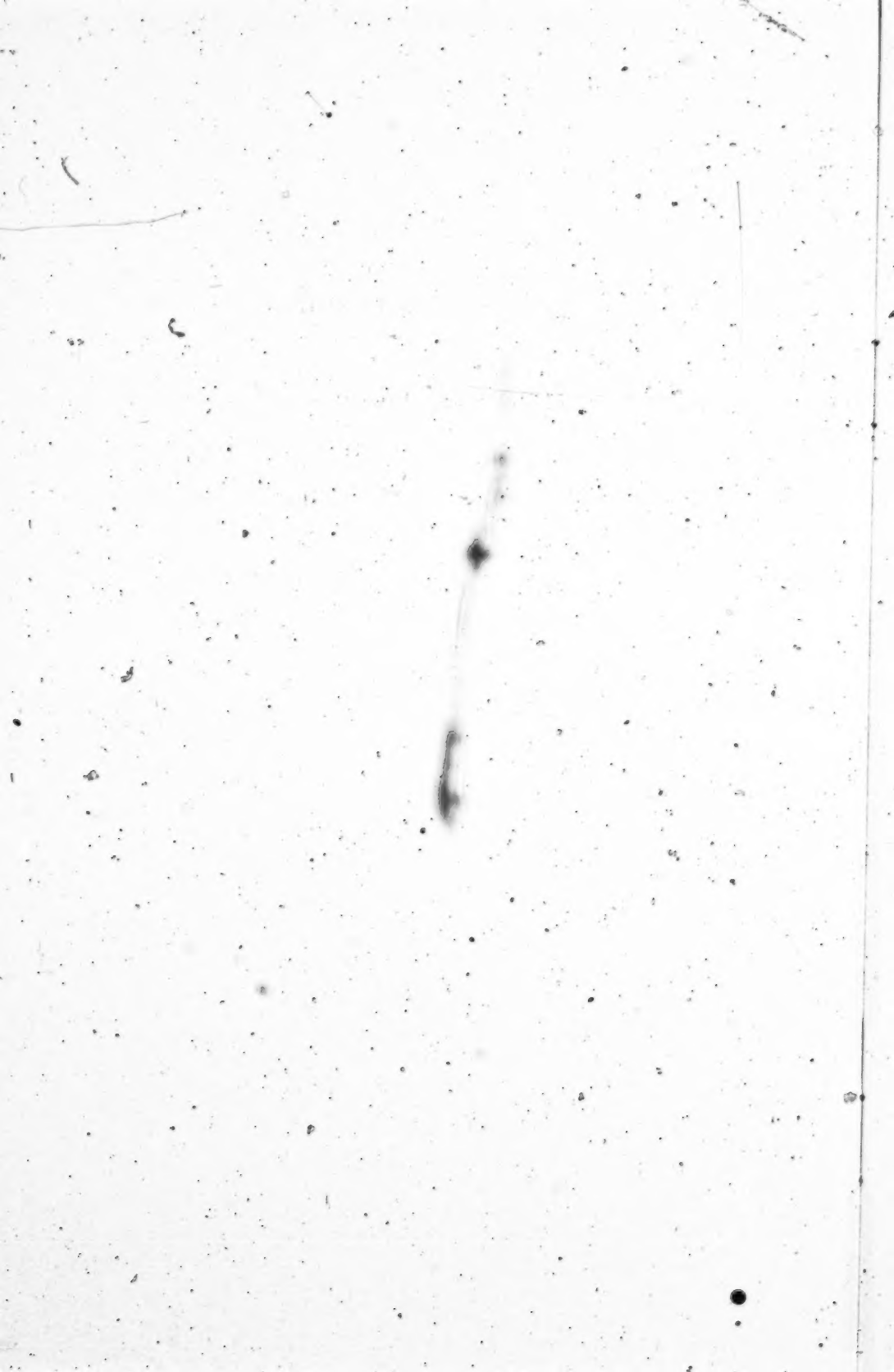

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the California District Court of Appeal err in holding that section 3(6) of the Carriage of Goods By Sea Act (COGSA) (46 U.S.C. § 1303(6)) which provides:

> "*In any event* the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." (emphasis supplied).

bars a late-filed lawsuit seeking damages for an alleged breach of a maritime contract providing for carriage of cargo under rather than on a vessel's deck?

ARGUMENT

I. Statutory Language and Statutory Policy Require Dismissal of Untimely Complaint.

It is difficult to imagine more unequivocal language than that used in section 3(6) of COGSA. The words "In any event" preceding the flat congressional mandate that "the carrier and the ship shall be discharged from all liability ... unless suit is brought within one year ...." unmistakably mean that a late-filed suit is time-barred under any circumstances and in all situations.

The language has been consistently so applied both with respect to the COGSA statute of limitations (*e.g. Potter v. North German Lloyd*, 50 F. Supp. 173 (N. D. Cal. 1943) and with respect to section 4(5) of the Act (46 U.S.C. § 1304(5)) where similar language appears. (*Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872 (7th Cir.) *cert. denied* 375 U.S. 819 (1964))

Short of spelling out factual situations to which the statute of limitations would apply, there is no way that Congress could have worded the statute to make it stronger, more unequivocal, or more universally applicable to all situations. Even without the words "in any event", the statute is forthright and unambiguous.

There are no considerations of public policy which point to creation of a judicial exception to the statute of limitations either on the ground that the carrier breached his contract by carrying cargo on deck rather than under deck, or because of any other breach. Rather, every consideration of policy supports the result below.

No type of breach of contract by the carrier, whether or not it is a breach deemed to constitute a "deviation"[1] by the vessel, affects the time in which a shipper can discover a loss and initiate a lawsuit. (Comment, 102 U. Pa. L. Rev. 797, 800 (1954)). Hence, there is no equitable consideration based on defendant's conduct that would justify a judicial exception to the limitations period, whether or not the cargo is covered by normal cargo insurance as a result of the breach. (*Compare* Petition at p. 5 *with* Appendix to Petition at p. 7)

The holding below, moreover, is consistent with the law of other nations operating under the Hague Rules on which COGSA is based. The Hague Rules created an international statute of limitations as to contracts governed by the Rules. Previously, there was no uniformity even within given jurisdictions. Uniform international commercial law is highly desirable, since, to businessmen, certainty, clarity and uniformity of commercial law are often of equal or greater significance than the substantive content of the law. Accordingly, the California District Court of Appeal was wholly correct when it justified its holding in part on the ground that the law of other nations operating under the Hague Rules does not provide for an exception to the one-year rule because cargo is carried on deck. (Appendix to Petition at 9-10, 28-29)[2]

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1. As Judge Learned Hand once stated: "a deviation is no more than a breach of the contract of carriage." (*Farr v. Hain S.S. Co.*, 121 F.2d 940, 944 (2d Cir. 1941).) It is, however, a fundamental breach of that contract which, by judicial decision, is deemed of sufficiently serious import to justify depriving the carrier of certain defenses inserted by the carrier into the contract of carriage.

2. *Stag Line Ltd. v. Foscolo, Mango & Co.* ([1932] App. Cas. 328) cited by Petitioner (Petition at 7-8) did not involve the statute of limitations in the Hague Rules but rather held that when a vessel went on the rocks after it recklessly and intentionally changed course to steam close to a rocky coast, it could not, by definition,

There is a further, powerful reason not to carve out exceptions to the COGSA statute of limitations. The one-year time limit on suit is specifically designed to require maritime cargo claimants to proceed promptly, while evidence and witnesses are available. Otherwise, vessel personnel may sign on other ships and be unobtainable as witnesses; the cargo that has been damaged may be sold or consumed; tally sheets may be disposed of and cargo checkers' and surveyors' memories may dim. Prompt filing of complaints is designed to obviate these difficulties.

II. All Precedents Support Result Below.

Despite Petitioner's attempt to paint the result below as a departure from precedent, the fact is that neither pre-COGSA nor post-COGSA case law supports the contention that a statute of limitations is rendered inapplicable because a carrier breaches his contract of carriage, whether or not that breach be deemed a "deviation" by the vessel. In short, precedent requires the result below.

Two decisions have held that late-filed complaints are time-barred by section 3(6) of COGSA despite allegations that the breach of contract by the vessel constituted a "deviation". (*Potter v. North German Lloyd*, 50 F. Supp. 173 (N.D. Cal. 1943) (non-delivery); *Singer Hosiery Mills, Inc. v. Cunard White Star, Ltd.*, 102 N.Y.S. 2d 762 (1951) (over-carriage). No cases hold to the contrary.

Similarly, the following cases have held various statutory defenses to be unaffected by one form or another of breach or "deviation" by the carrier.

A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd., 199 F.2d 134 (4th Cir. 1952), *cert. denied*, 345 U.S.

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avoid liability to cargo owners on the ground that the damage suffered was caused by a "peril of the sea". Petitioner has cited no cases in *any* jurisdiction that conflict with the decision below.

992 (1953). (Deck stowage "does not deprive the carrier of his right to exoneration under the fire provision of . . ." COGSA (46 U.S.C. § 1304(2)(b)) or of the fire statute (46 U.S.C. § 182) unless, as the statutes themselves provide, the breach was the cause of the fire.)

Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt, G.m.b.H., 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963). (Overcarriage as deviation held not to vitiate defense of valuation limitation in COGSA § 4(5) (46 U.S.C. § 1304(5)).

The Ida, 75 F.2d 278, 279 (2d Cir. 1935). (Deviation may deprive carrier of contractual defenses but not statutory defense of fire statute (46 U.S.C. § 182).)

Nassau Glass Co. v. Noel Roberts, Ltd., 249 F. Supp. 116 (S.D. Fla. 1965). ("Deviation" allegation does not avoid COGSA § 4(5) defense (46 U.S.C. § 1304(5)).

Cases holding that carriers may not rely on certain defenses after a breach of contract deemed a "deviation" all concern *contractual* rather than statutory defenses. (e.g. *Jones v. The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953)). These cases, as the Court of Appeals for the Second Circuit has pointed out,

> "all deal with one phase or another of how far a party who has comitted a fundamental breach of contract will be permitted to retain any *contractual* advantage." (*The Ida*, 75 F.2d 278, 279 (2d Cir. 1935) (emphasis supplied).)

The post-COGSA cases which reject the assertion that a breach of contract creates an exception to the COGSA

statute of limitations, are perfectly consistent with pre-COGSA law. Nonetheless, Petitioner seeks to create the impression that the California District Court of Appeal held that COGSA changed the prior law of "deviation" and its effect on a statutory carrier defense. (Petition at p. 5) Whether or not COGSA changed prior law in any given respect is a question that need not be reached, since nothing in the pre-COGSA cases suggests a different result here.

Prior to passage of COGSA there was no statute of limitations applicable to suits on maritime contracts of carriage. The doctrine of laches applied under which local statutes of limitation—obviously with varying time provisions—were used as guidelines. (See Appendix to Petition at 5) Petitioner cites no cases, and we know of no cases, in which alleged on-deck carriage of cargo or other breach of contract by the carrier was ground for disregarding the time bar of laches or of a local statute of limitations.

III. Question Here Is Well-Settled and Does Not Merit This Court's Attention.

None of the criteria for the grant of certiorari suggested by Rule 19 of the Court's Rules are satisfied here. Viewed in any reasonable perspective the question whether an exception to the COGSA statute of limitations should be created on the instant facts is not a matter of such national, maritime, or commercial significance as to merit the attention of this Court. Indeed, by denying hearing the Supreme Court of California indicated that the question was not of sufficient importance to warrant the expenditure of that court's time. The question is a simple, narrow one that has been adequately, uniformly and correctly dealt with by the lower courts that have considered it. It is not a question of such complexity or importance that the aid of this Court is properly invoked.

CONCLUSION

The instant question was correctly decided by the court below; moreover it is not of sufficient importance to merit this Court's attention. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Date September 11, 1967

CERTIFICATE OF SERVICE

I, R. FREDERIC FISHER, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent respondent N.V. Nederlandsch Amerikaansche, etc. in the above entitled matter, in whose behalf service of the foregoing Brief has been effected as herein stated.

I certify that on or before September 11, 1967, I served the foregoing Brief in Opposition to Petition for Writ of Certiorari by service of three (3) copies upon the attorneys for Petitioner, by mailing the same at San Francisco, California, postage prepaid, first class mail, as follows:

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